Name: Jason Christopher Lidyard

JUDICIAL SELECTION COMMISSION

Application for Judicial Vacancy on the First Judicial District Court

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APPLICATION

PERSONAL

1. Full Name	Jason Christopher Lidyard
2. County of Residence	United States of America
3. Birthplace	Fairview, Ohio
4. If born outside the US, give the basis for your citizenship	N/A
5. Birth Date	[redacted] 1981
6. Marital Status	Single
7. If married, list spouse's full name	N/A
8. Spouse's occupation	N/A

9. Do you have any other familial relationships that might present conflicts if you were to be seated as a judge? If so, please explain these relationships and how you would address any conflicts.

Answer 9: No

10. List all places of residence, city and state, and approximate dates for the last 10 years

Date(s)of Residence	Street Address	City	State	Zip
May 2011 – Present	142 Duran Street	Santa Fe	NM	87501
August 2010 – May 2011	9930 N. Guadalupe Trl. NW	Albuquerque	NM	87114
May 2010 – August 2010	2200 Forest Street	Denver	CO	80207
August 2009 – May 2010	8 Lester B. Orcutt Blvd.	Biddeford Pool	ME	04006
May 2009 – August 2009	32576 Detroit Road	Avon	OH	44011
August 2008 – May 2009	8 Lester B. Orcutt Blvd.	Biddeford Pool	ME	04006
May 2008 – August 2008	32576 Detroit Road	Avon	OH	44011
August 2007 – May 2008	93 Union Avenue	Old Orchard Beach	ME	04064

EDUCATION

11. List schools attended with dates and degrees (including all post-graduate work)

High School(s)	Avon Lake High School	1995 – 1999	College Preparatory
College(s)	Ohio University	1999 – 2003	Bachelor of Arts
Law School(s)	University of Maine	2007 – 2010	Juris Doctorate

12. Bar Admissions and Dates	Colorado, admitted on October 25, 2010 New Mexico, admitted on April 25, 2011

EMPLOYMENT

13. List Your Present Employment	
Date(s) of Employment	April 2011 – Present
Employer	First Judicial District Attorney's Office
Mailing Address	327 Sandoval Street, Santa Fe, NM 87504
Business Phone	505-827-5000
Position	Deputy District Attorney
Duties	Prosecution of criminal cases
Supervisor	Jennifer Padgett and Susan Stinson
14. List Your Previous Employment (beginning with most recent)	
Dates of Employment	August 2010 – December 2010
Employer	New Mexico Legal Aid
Mailing Address	P.O. Box 25486, Albuquerque, NM 87125-5486
Business Phone	505-243-7871
Business FAX	505-227-8712
Employer's Email Address	newmexicolegalaid.org
Position	Volunteer
Dates of Employment	January 2010 – May 2010
Employer	Federal Defender's Office for the District of Maine
Mailing Address	P.O. Box 595, Portland, ME 04112-0595
Business Phone	207-553-7070
Business FAX	207-533-7017
Employer's Email Address	infomaine@fd.org
Position	Licensed Student Attoreny
Dates of Employment	August 2009 – January 2010
Employer	Cumberland Legal Aid Clinic
Mailing Address	59 Exeter Street, Portland, ME 04102
Business Phone	207-780-4370
Business FAX	207-780-4239
Employer's Email Address	deirdre.smith@maine.edu
Position	Licensed Student Attorney
Dates of Employment	May 2009 – August 2009
Employer	City of Cleveland Prosecutor's Office
Mailing Address	1200 Ontario Street, Justice Center, Cleveland, OH 44113
Business Phone	216-664-4850
Business FAX	216-664-2663
Employer's Email Address	lcoyne@city.cleveland.oh.us
Position	Licensed Student Attorney
Dates of Employment	May 2008 – August 2008
Employer	BVC Construction, Inc.

Mailing Address	32334 Lake Road, Avon Lake, OH 44012
Business Phone	440-930-4728
Business FAX	440-930-4658
Employer's Email Address	bvc.enterprises@yahoo.com
Position	General Laborer
Dates of Employment	June 2007 – August 2007
Employer	Dover Concrete Contractors, Inc.
Mailing Address	34340 Mills Road, Suite C, Avon, OH 44011
Business Phone	440-327-6788
Business FAX	440-327-7719
Employer's Email Address	doverconcrete@windstream.net
Position	General Laborer
Dates of Employment	July 2004 – June 2007
Employer	Colorado General Assembly, Office of Legislative Legal Service
Mailing Address	200 E. Colfax Avenue, Denver CO 80203-1716
Business Phone	303-866-2045
Business FAX	303-866-4157
Employer's Email Address	dan.cartin@state.co.us
Position	Legislative Editor
Dates of Employment	February 2004 – June 2004
Employer	Home Depot
Mailing Address	500 S. Santa Fe Drive, Denver, CO 80223
Business Phone	303-765-0400
Business FAX	303-698-7096
Employer's Email Address	asm_1505@homedepot.com
Position	Sales Associate
Dates of Employment	May 2003 – August 2003
Employer	Avon Lake Service Department
Mailing Address	750 Avon Belden Road
Business Phone	440-930-4161
Business FAX	440-930-4111
Employer's Email Address	emoran@avonlake.org
Position	General Laborer
Dates of Employment	May 2002 – August 2002
Employer	Avon Lake Service Department
Mailing Address	750 Avon Belden Road
Business Phone	440-930-4161
Business FAX	440-930-4111
Employer's Email Address	emoran@avonlake.org
Position	General Laborer

Dates of Employment	May 2001 – August 2001
Employer	Avon Lake Service Department
Mailing Address	750 Avon Belden Road
Business Phone	440-930-4161
Business FAX	440-930-4111
Employer's Email Address	emoran@avonlake.org
Position	General Laborer

PARTNERS AND ASSOCIATES

15. List all partners and associates, beginning with the current or most recent:

Answer 15: N/A

EXPERIENCE

16. How extensive is your experience in Personal Injury Law?

Answer 16: I have some experience in this field. Throughout my career as a prosecutor, I have handled countless DWI cases. Some of those cases unfortunately involved car accidents in which individuals were injured and, sometimes, lost lives. In prosecuting these cases, I confronted legal questions, similar in nature to those in personal injury law, arising from the complexities of applying principles of causation, liability, and damages to everyday life. Although my cases were criminal in nature, they were informative as to the difficult questions encountered by practitioners in the field of personal injury law.

17. How extensive is your experience in Commercial Law?

Answer 17: I have some experience in this field. In law school, I took courses in Contracts, Tax, Real Estate Transactions, Corporations and Other Business Organizations, Torts, Property, and Civil Procedure. I also wrote an article on antitrust law published by the University of Maine School of Law, as well as two French institutions of higher education, entitled, *Merger Regulation in the United States During the Economic Crisis: The Failing Firm Defense* (see enclosed Separate Document #2).

18. How extensive is your experience in Domestic Relations Law?

Answer 18: I have some experience in this field. Aside from my studies in family law during law school, I represented two clients in domestic relations matters while working for a legal aid office in Portland, Maine. In the first case, I represented a physically disabled, immigrant woman who was seeking spousal support from her former spouse of twenty years. In the other case, I represented a woman who was seeking sole custody of her intellectually disabled son from her abusive ex-husband. In addition to these cases, I have experience with domestic relations law through my work as a prosecutor in handling domestic violence and child abuse cases. Often times accompanying these criminal cases are domestic relations matters involving protection orders, custody, visitation, and abuse and neglect. Although I did not personally handle these accompanying matters, my experience with the associated criminal cases did familiarize me with domestic relations law and its processes.

19. How extensive is your experience in Juvenile Law?

Answer 19: I have extensive experience in this field. As a prosecutor, I've worked criminal cases involving juvenile offenders in each class of the juvenile classification system established by New Mexico's Children's Code and the Rules of the Children's Court. As a result, I am versed in the rules of procedure governing each class of juvenile offender as well as the corresponding sentencing schemes.

20. How extensive is your experience in Criminal Law?

Answer 20: I have extensive experience in this field. While at the District Attorney's Office, I have worked criminal cases involving a wide array of offenses throughout each stage of prosecution – from charging to sentencing. Homicides, sex offenses, violent felonies, child abuse, domestic violence, drug trafficking, property and theft crimes, I've handled them all. I've also dedicated an extensive amount of time to understanding the intricacies of the rules of evidence and criminal procedure and to remaining current with the case law of this field. Over my years as a prosecutor, I have become adept in oral and written advocacy through extensive motions practice and litigation before the trial courts of the First Judicial District. Additionally, I have extensive experience with mental health commitments, both civil and criminal. From this work, I am knowledgeable of the challenges presented at the intersection of mental health and criminal law and I am familiar with the legal mechanisms available in New Mexico to address them. Finally, I have extensive experience with criminal justice intervention programs, including the Drug Court program and the Law Enforcement Assisted Diversion (LEAD) program. My work with these intervention programs has provided me an education in criminal law that I could not have learned inside any courtroom or casebook. For my hard work and dedication as prosecutor, I received the award of First Judicial District Prosecutor of the Year in 2012.

21. How extensive is your experience in Appellate Law?

Answer 21: Aside from spectating at the oral arguments before the New Mexico Supreme Court, my experience in this field is limited to following the progression of criminal cases that I prosecuted through their appeals.

22. How many cases have you tried to a jury? Of those trials, how many occurred within the last two years? Please indicate whether these jury trials involved criminal or civil cases.

Answer 22: I have tried twenty-three cases to a jury. Nine of those trials occurred within the last two years. All twenty-three trials involved criminal cases.

23. How many cases have you tried without a jury? How many of these trials occurred within the last two years? Please indicate whether these non-jury trials involved criminal or civil cases.

Answer 23: I have tried approximately thirty cases without a jury. (Note: I have also handled numerous preliminary examinations as well as adjudicatory hearings for probation violations and civil commitments that in many ways are akin to a non-jury trial.) Of the thirty cases that I tried without a jury, one trial occurred within the last two years. All my non-jury trials involved criminal cases.

24. How many appeals have you handled? Please indicate how many of these appeals occurred

within the last two years.
Answer 24: None

PUBLIC OFFICES/PROFESSIONAL & CIVIC ORGANIZATIONS

25. Public Offices Held and Dates	
Public Office	Dates
Assistant District Attorney, First Judicial District of New Mexico	April 2011 – June 2014
Deputy District Attorney, First Judicial District of New Mexico	June 2014 – Present

26. Activities in professional organizations, including offices, held, for last 10 years		
Professional Organization	Position Held	Dates
N/A		
27. Activities in civic organizations, including offices, held, for last 10 years		
Civic Organization	Position Held	Dates
N/A		

28. Avocational interests and hobbies
Answer 28: Avid hiker, reader, and runner.

29. Have you been addicted to the use of any substance that would affect your ability to perform the essential duties of a judge? If so, please state the substance and what treatment received, if any.
Answer 29: No
30. Do you have any mental or physical impairment that would affect your ability to perform the essential duties of a judge? If so, please specify
Answer 30: No
31. To your knowledge, have you ever been disciplined for violation of any rules of professional conduct in any jurisdiction? In particular, have you ever received any discipline, formal or informal, including an "Informal Admonition." If so, when, and please explain.
Answer 31: No
32. Have you ever been convicted of any misdemeanor or felony other than a minor traffic offense?

Answer 32: In 1999, at eighteen years of age, I entered a no-contest plea to underage consumption of alcohol in the Municipal Court of Avon, Ohio.
33. Have you ever had a DWI or any criminal charge, other than a minor traffic offense, filed against you? If so, when? What was the outcome?
Answer 33: In 1999, at eighteen years of age, I entered a no-contest plea to underage consumption of alcohol in the Municipal Court of Avon, Ohio.
34. Have you ever been a named party in any lawsuit in either your personal or professional capacity? If so, please explain the nature of the lawsuit(s) and the result(s).
Answer 34: No
35. To your knowledge, is there any circumstance in your professional or personal life that creates a substantial question as to your qualifications to serve in the judicial position involved or which might interfere with your ability to so serve?
Answer 35: No
36. If you have served as a judge in New Mexico, have you ever been the subject of charges of a violation of the Code of Judicial Conduct for which a public filing has occurred in the New Mexico Supreme Court, and if so, how was it resolved?
Answer 36: N/A
37. If you have served as a judge in New Mexico, have you ever participated in a Judicial Performance Evaluation, including interim, and if so, what were the results?
Answer 37: No
38. Have you filed all federal, state and city tax returns that are now due or overdue, and are all tax payments up to date? If no, please explain.
Answer 38: Yes
39. Have you or any entity in which you have or had an interest ever filed a petition in bankruptcy, or has a petition in bankruptcy been filed against you? If so, please explain.
Answer 39: No
40. Are you presently an officer, director, partner, majority shareholder or holder of a substantial interest in any corporation, partnership or other business entity? If so, please list the entity and your relationship:

Answer 40: No

41. Do you foresee any conflicts under the NM Code of Judicial Conduct that might arise regularly? If so, please explain how you would address these conflicts.

Answer 41: No

42. Do you meet the constitutional qualifications for age, residency, and years of practice for the judicial office for which you are applying? Please explain.

Answer 42: Yes, I am over thirty-five years of age, a resident of Santa Fe, New Mexico, for the last six years, and a lawyer engaged in the actual practice of law for at least six years preceding the date of this application.

43. Please explain your reasons for applying for a judicial position and what factors you believe indicate that you are well suited for it.

Answer 43:

Every ruling made by a Judge has an impact on the life of some human being. Therefore, in every case, a Judge must be relentless in their pursuit to know the facts and controlling law, must be unwavering in their duty to remain unbiased and open-minded, and must be courageous in their loyalty to rule as the law requires. Through fulfilling these responsibilities, I believe a Judge best serves the public, and the interests of justice, by standing as a neutral arbiter who fairly and decisively administers the law. I am well suited to fulfill these responsibilities because of my commitment to the law and its fair application as well as my dedication to serving the public. And that is why I am applying for the position of District Judge in the First Judicial District.

From an early age I learned that ours is a nation of laws and that along with the law's great potential to produce justice is the law's inverse potential to produce injustice. In acknowledgment of these potentialities, when I began my practice of law, I pledged that so long as I work in this profession where my decisions will undoubtedly have consequences on the lives of others, I will use every power of my mind, my being, and my heart to get those decisions right. Throughout my career as a criminal prosecutor, I have worked tirelessly to uphold this pledge every day.

As an Assistant District Attorney for the last six years, I have served the communities of Northern New Mexico by representing its citizens in criminal cases throughout the First Judicial District. In each case assigned to me, I am responsible for making decisions that have profound effects on the lives of individuals, their families, our communities, and beyond. Dedicated to this entrusted responsibility and to my pledge, I have devoted my life to not only understanding the facts and controlling law of those cases but also to evaluating those cases honestly and without influence from natural bias or preconceived notion. By adhering to this relentless process, I know that the decisions I reach are those which the law demands and justice requires.

Inevitably, and understandably, not everyone will agree with all of my decisions. Nevertheless, when situated between the desires of popular demand and the dictates of the law, I have loyally followed the

latter. Even in the face of opposition, I have courageously stood by my decisions knowing that they were firmly rooted in the law, and its fair application, and that as a servant of the public, it is my responsibility to do so.

If I were selected to be District Judge, I would accept the Judge's responsibilities as obligations to all the public whose lives will be impacted by my stewardship of the law. And to uphold those obligations, I would devote my life, as I do today, to the production of justice by ruling in accordance with the law, and its fair application.

44. Does submission of this application express your willingness to accept judicial appointment to the First Judicial District Court if your name is chosen by the Governor?

Answer 44: Yes

AFFIRMATION

The undersigned hereby affirms that he/she is the person whose signature appears herein on this application for judicial appointment; that he/she has read the same and is aware of the content thereof; that the information that the undersigned has provided herein is full and correct according to the best knowledge and belief of the undersigned; that he/she has conducted due diligence to investigate fully each fact stated above; that he/she executed the same freely and voluntarily; that he/she affirms the truth of all statements contained in this application under penalty of perjury; and that he/she understands that a false answer may warrant a referral to the Disciplinary Board or other appropriate authorities.

/s/: Jason Lichyard Date: 8-22-2017

Name: Jason Christopher Lidyard

SEPARATE DOCUMENT #1 – LEGAL WRITING SAMPLE

Dear Chairman and Members of the Judicial Nominating Commission:

For my legal writing sample, I have enclosed a response motion that I recently drafted and filed in the case of *State v. Nicholas Ortiz*, D-0101-CR-2015-00203, in which I responded to the defendant's motion for new trial based on a claim of fundamental error in the jury instructions.

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff,

v. **No. D-0101-CR-2015-00203**

NICHOLAS ORTIZ,
Defendant.

STATE'S RESPONSE MOTION TO DEFENDANT'S SECOND MOTION FOR NEW TRIAL

The State of New Mexico, through undersigned counsel, responds to the Defendant's Second Motion for New Trial filed on July 25, 2017. In that Motion, the Defendant claims that a new trial should be granted because fundamental error occurred as a result of an omission in the jury instructions used at trial. Specifically, the Defendant claims that the jury instructions for felony murder did not contain a provocation element and that that omission constitutes fundamental error because provocation is an essential element of felony murder. The State asserts that provocation is not always an essential element of felony murder and when provocation is not at issue, like in this case, an instruction on provocation is not required. Therefore, omission of the provocation element from the felony murder instructions in this case was proper and no error occurred.

LAW AND ARGUMENT

Trial courts are required to "instruct the jury upon all questions of law essential for a conviction of any crime submitted to the jury," Rule 5-608 NMRA, and "failure of the court to instruct the jury on the essential elements of a crime constitutes fundamental or jurisdictional error." *State v. Osborne*, 1991 NMSC 032, ¶ 10. The essential elements of felony murder are

contained in UJI 14-202 NMRA. Provocation is the fourth element of that instruction and its Use Note provides that "[t]his element is to be given *only when provocation is an issue. In that circumstance UJI 14-221A NMRA*, voluntary manslaughter; lesser included offense of felony murder, *should be given.*" (emphasis added). In accordance with this directive, the New Mexico Supreme Court has held that in murder cases, including felony murder, instruction on the provocation element is required only when provocation is at issue and, thus, voluntary manslaughter is a lesser-included offense of murder.

In *State v. Swick*, the defendant was convicted of second-degree murder after the jury was instructed on deliberate first-degree murder with step-down instructions for second-degree murder and voluntary manslaughter. 2012 NMSC 018 ¶¶ 3, 5-6, 45. On appeal, the defendant claimed fundamental error because although the instruction for voluntary manslaughter contained the provocation element, the instruction for second-degree murder did not. *Id.*, at ¶¶ 45-46, 49. The New Mexico Supreme Court found the case to rest on one controlling question: "[W]hether 'without sufficient provocation' is an essential element of second-degree murder *when* the jury is instructed on voluntary manslaughter as a potential lesser-included offense." *Id.*, at ¶ 55 (emphasis added). Answering the question in the affirmative, the New Mexico Supreme Court relied on the following distinction between second-degree murder instructions UJI 14-210 NMRA and UJI 14-211 NMRA:

> "The title of [UJI 14-211] indicates that it is applicable when 'voluntary manslaughter [is] *not* a lesser included offense' of second-degree murder and its Use Note states that the instruction applies '*only when* second-degree murder is the lowest degree of homicide to be considered by the jury. *When voluntary manslaughter is a lesser-included offense, an additional element is added to the instructions between elements 2 and 3 of UJI 14-211.* Swick points out that UJI 14-210, the instruction that should have been given to the jury, [contains the provocation element.]" *Id.*, at 48. (emphasis added).

Applying these instructions, the Supreme Court held that omission of the provocation element from the second-degree murder instruction was fundamental error because the facts of the case placed provocation at issue and supported voluntary manslaughter as a lesser-included offense. *Id.*, at ¶¶ 57-58

In *State v. Montoya*, again, the jury was instructed on deliberate first-degree murder with step-down instructions for second-degree murder and voluntary manslaughter. 2013 NMSC 020, ¶¶ 4-7, 9. Unlike *Swick*, however, the jury was also instructed to consider an alternative theory of felony murder. *Id.*, at ¶ 9. While the second-degree murder instruction submitted as a step-down to deliberate first-degree murder contained the provocation element, the felony murder instruction made no reference to provocation. *Id.* The jury ultimately returned verdicts finding the defendant guilty of both voluntary manslaughter, as a lesser-included offense of deliberate first-degree murder, and felony murder. *Id.*, at ¶ 11. The district court vacated the voluntary manslaughter conviction, leaving the felony murder conviction and imposed a life sentence. *Id.* The defendant appealed to the New Mexico Supreme Court claiming that omission of the provocation element from the felony murder instruction constituted fundamental error because provocation is an essential element of felony murder. *Id.*, at ¶ 13. In analyzing this claim, the Supreme Court began by recognizing that, "[u]nder New Mexico law, felony murder is second-degree murder that is elevated to first-degree murder when the murder was committed during the commission or attempted commission of some other dangerous felony." *Id.*, at ¶¶ 14-15. The Court also recognized that "[m]itigation of killing from murder to manslaughter requires legally sufficient 'provocation.'" Then, citing *State v. Swick*, the Court stated:

> "[O]ur Uniform Jury Instructions explicitly require inclusion of the essential element of lack of provocation in a second-degree murder elements instruction *whenever it is an issue* the jury should consider.

> *This is why we provide two separate uniform elements instructions for second-degree murder. One, for use when provocation is in issue,* instructs jurors that they cannot convict of second-degree murder unless they find that the defendant 'did not act as a result of sufficient provocation.' UJI 14-210 NMRA. *The other*, which the use notes caution is 'to be used only when second-degree murder is the lowest degree of homicide to be considered by the jury,' *makes no reference to the provocation element.* UJI 14-211 NMRA n. 1." *Id.*, at ¶ 18 (emphasis added).

Finding that provocation was "very much at issue in this case," the Supreme Court held that the felony murder instruction should have contained the provocation element because "[f]ailure to include this important distinction between second-degree murder and voluntary manslaughter *under the facts of this case* was fundamental error." *Id.*, at ¶¶ 19, 21 (emphasis added).

In *State v. Daugherty*, once again, the jury was instructed on deliberate first-degree murder with step-down instructions for second-degree murder and voluntary manslaughter. 2013 WL 4105525, ¶ 9 (unpublished decision). Like *Montoya*, the jury was also instructed to consider an alternative theory of first-degree felony murder. *Id.* The defendant was convicted of first-degree murder under a general verdict form and, on appeal, claimed fundamental error because the felony murder instruction did not contain the provocation element. *Id.*, at ¶¶ 9, 12. Rejecting this claim, the New Mexico Supreme Court "conclude[d] that there was insufficient evidence of provocation to entitle [the] defendant to such an instruction" despite the fact that voluntary manslaughter was instructed on as a lesser-included offense of deliberate first-degree murder. Examining the evidence presented at trial, the Court held that omission of the provocation element from the felony murder instruction did not constitute fundamental error because "[t]he evidence in this case *did not create a jury issue* on either of the essential elements necessary to justify a jury instruction on whether an intentional homicide could be lawfully mitigated from murder to manslaughter as a result of legally sufficient provocation."

Here, the Defendant has never claimed that these murders were the result of sufficient provocation. Rather, the Defendant has always maintained that he had no involvement in these murders and that someone else committed them. Therefore, unlike *Swick* and *Montoya*, provocation was not at issue in this case and voluntary manslaughter was not a lesser-included offense of these felony murders. Accordingly, instruction on the provocation element was not required and omission of the provocation element from the felony murder instructions was proper.

CONCLUSION

For the above-stated reasons, the State requests that this Court deny the Defendant Second Motion for New Trial.

Respectfully submitted,

Jason Lidyard

Jason Lidyard
Deputy District Attorney
First Judicial District of New Mexico

I certify that a copy of this pleading was delivered to opposing counsel.

Name: Jason Christopher Lidyard

SEPARATE DOCUMENT #2 – PUBLICATION

Dear Chairman and Members of the Judicial Nominating Commission:

I have attached a copy of a 2010 article that I wrote regarding antitrust law and application of the failing firm defense in the context of the 2008 Financial Crisis. The article was published by the University of Maine School of Law as well as the French educational institutions of the University of Rennes and the University of Mainé.

The Financial Crisis of 2008: French and American Responses

Proceedings of the 2010 Franco-American Legal Seminar

Published jointly by
The University of Maine School of Law
and
La Faculté de Droit,
des Sciences Économiques et de Gestion
de l'Université du Maine
with the participation of
La Faculté de Droit et de Science Politique
de l'Université de Rennes 1

The Financial Crisis of 2008: French and American Responses

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The Financial Crisis of 2008: French and American Responses is a joint publication of the University of Maine School of Law and the Faculté de Droit, des Sciences Économiques et de Gestion de l'Université du Maine, with the participation of the Faculté de Droit et des Sciences Politiques de l'Université de Rennes 1.

The Financial Crisis of 2008: French and American Responses

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MERGER REGULATION IN THE UNITED STATES DURING THE ECONOMIC CRISIS: THE FAILING FIRM DEFENSE

Jason Lidyard[*]

I. INTRODUCTION

Antitrust enforcement is a controversial issue in today's economy. The current economic crisis has drastically decreased demand in various industries, in turn causing excesses in capacity, stagnant factories, and widespread unemployment. With long-term demand forecasts looking grim and the economy showing no signs of improvement, corporations are facing increased pressure to reduce costs and enhance efficiency. To achieve these goals, many companies began exploring the viability of mergers and acquisitions.

Mergers and acquisitions often result in the elimination of redundant costs and functions, the optimization of plants and production, and the generation of significant efficiencies and synergies. Combinations like JP Morgan and Bear Stearns, or Bank of America and Merrill Lynch, have already occurred in the United States. And it is fair to say that this is just the beginning.

But mergers and acquisitions, taken too far, also hold the risk of running afoul of antitrust laws. The United States antitrust laws seek "to preserve competition in the U.S. economy and to ensure that U.S. consumers continue to enjoy the benefits of that competition."[1] As applied to mergers and acquisitions, antitrust laws seek "to ensure that such transactions do not create, enhance, or facilitate the exercise of market power," thereby providing one or more firms the ability to control the market.[2] To accomplish this goal, the relevant regulation aims to prevent abuses by blocking mergers and acquisitions that have the potential of creating market power.[3]

In the era of corporations "too big to fail," the prophylactic nature of merger regulation offers a potentially effective means of preventing the creation of conglomerates that could pose future threats to the economy. However, in determining whether a merger or acquisition violates antitrust

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[*] J.D., 2010, University of Maine School of Law.

[1] ROBERT S. SCHLOSSBERG, MERGERS AND ACQUISITIONS: UNDERSTANDING THE ANTITRUST ISSUES 1 (2d ed., 2004) [hereinafter SCHLOSSBERG].

[2] *Id.*

[3] *Id.* at 2.

laws, enforcement agencies, as well as the judiciary, have recognized that, in some cases, the anticompetitive effects of a failed corporation are greater than those of the accumulation of excessive market power. Accordingly, the risk of outright failure may be the very reason for authorizing an otherwise economically threatening merger.

This Article examines the issue of whether this rationale, known as the failing firm defense, should be modified during an economic crisis situation in order to preserve the effectiveness of merger regulation in the United States. Part II is an overview of merger activity and merger regulation in the United States. Part III traces the modern history of the failing firm doctrine, examining its ascendency as an affirmative defense and later adoption by the Merger Guidelines, and discusses the significance of a firm's "flailing" condition in relation to merger regulation. Part IV concludes that the principles underlying the failing firm defense apply equally to thriving and recession economies and, therefore, the defense should not be modified during an economic crisis situation.

II. MERGER ACTIVITY AND ENFORCEMENT IN THE UNITED STATES

A merger occurs, typically, when two or more separate entities come under common ownership or control.[4] A merger can occur through stock acquisition, asset acquisition, or consolidation.[5] Regardless of how the merger occurs, each merger is classified as one of three types: (1) horizontal; (2) vertical; or (3) conglomerate.[6] A horizontal merger involves firms that are in direct competition with each other.[7] A vertical merger involves entities in a buyer-seller relationship, e.g., a manufacturer merging with a distributor of its product.[8] A conglomerate merger involves firms that are neither direct competitors nor in a buyer-seller relationship.[9] The two types of conglomerate mergers that potentially threaten competition are (1) those that involve mergers between firms that make the same product but distribute in different geographic regions (market extension mergers) and (2) those that involve mergers between firms that manufacture different products but

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[4] LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 512 (2000).

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

whose manufacturing process is similar (product line extension mergers).[10]

Although advantageous for the firms involved, mergers have the potential to thwart competition in a market. Two possible anticompetitive effects underlie all mergers: 1) a propensity to increase the merging parties' market power, and 2) the potential for abuse of that power.[11] For example, horizontal mergers inherently present anticompetitive effects because such mergers involve direct competitors.[12] When direct competitors merge, the conglomerate firm obtains the market share that each firm possessed individually and the number of competitors in the market is reduced by the number of firms involved in the merger.[13] As an added result, new firms are discouraged from entering into the market because power has become concentrated among a few firms.[14] Moreover, the efficiencies and synergies produced by the merger provide the conglomerate firm with economic, technological, and financial superiority that amplifies its market power.[15] This superiority allows the conglomerate the opportunity to engage in price-cutting and other unfair practices that threaten the stability of smaller firms and further deters the entry of new ones into the market.[16] Finally, remaining market competitors will seek merger opportunities of their own as a defensive measure.[17]

To forestall these anticompetitive effects, various state and federal antitrust laws have been promulgated to regulate mergers and acquisitions. The primary federal antitrust statute is section 7 of the Clayton Act, which provides in pertinent part:

> No person engaged in commerce or in any activity affecting

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[10] *Id.*

[11] *Id.* at 530.

[12] *Id.*

[13] For example, suppose in Market A there are ten competing firms all located in Region A. If Firm X, which has a market share of 10 percent, and Firm Y, which has a market share of 10 percent, merge then post-merger Firm XY will have a market share of 20 percent. Moreover there will no longer be ten competing firms in Region A of Market A. Rather, there will only be nine competing firms.

[14] *See* United States v. Phillipsburg Natl. Bank, 399 U.S. 250, 365-66 (1970); Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962).

[15] EARL W. KINTNER, 1 FEDERAL ANTITRUST LAW § 34.3 (1980).

[16] *See* United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 604-05 (S.D.N.Y. 1958).

[17] *See* Am. Crystal Sugar Co. v. Cuban Am. Sugar Co., 152 F. Supp. 387, 399-400 (S.D.N.Y. 1957).

> commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, *the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.*[18]

Enforcement of these provisions is entrusted to the Antitrust Division of the United States Department of Justice and the Federal Trade Commission (Agencies), who share jurisdiction for challenging mergers and acquisitions under section 7 of the Clayton Act.

Merger regulation commences upon the filing of pre-merger notification by the merging firm. Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976,[19] if a proposed merger or acquisition exceeds a certain threshold,[20] the merging firms must notify and submit certain information to the Agencies and observe a thirty-day waiting period prior to consummation of the transaction.[21] During this period,[22] the Agencies conduct a review of the proposed transaction.[23]

In reviewing any given transaction, the Agencies attempt to determine the proposed merger or acquisition's likely effect on market competition by analyzing specific factors set forth in the Merger Guidelines.[24] First, the Agencies assess whether the merger would

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[18] 15 U.S.C. § 18 (2000) (emphasis added).

[19] 15 U.S.C. § 18a (2000).

[20] *See* 15 U.S.C. § 18a(d); 16 C.F.R. §§ 801-803. Not all transactions are reportable under the HSR Act. The original language of the Act provided that transactions valued $15 million or less were not subject to the reporting requirement. In 2001, the reporting threshold was increased to $50 million. The Act also exempted certain transactions from the reporting obligation. Transactions that are not subject to the Act's notification and waiting requirements are nevertheless subject to the substantive antitrust jurisdiction of the Agencies.

[21] *See* 15 U.S.C. § 18a(d); 16 C.F.R. §§ 801-803.

[22] The 30-day waiting period is subject to extension by the issuance of a request for additional information until 30 calendar days after the parties have substantially complied with the Agencies' request. *See* 15 U.S.C. § 18a(e)(2); 16 C.F.R. § 803.20.

[23] 15 U.S.C. § 18a(a)-(b).

[24] Issued jointly by the Department of Justice (DOJ) and Federal Trade Commission (FTC), the Merger Guidelines provide a public explanation of how and why the Agencies make the decisions they do regarding merger regulation. Although the Merger Guidelines provide the DOJ and FTC with an analytical tool with which

significantly increase concentration of market shares and produce market power.[25] Second, the Agencies assess whether the merger, in light of market concentration and other factors characterizing the market, raises concern for potential anticompetitive effects.[26] Third, the Agencies assesses whether entry of new firms into the market would be timely, likely, and sufficient to deter or counteract any anticompetitive effects.[27] Fourth, the Agencies assess any efficiency gains that could not be achieved by the firms through other means.[28] Finally, the Agencies assess whether, but for the transaction, either firm would be likely to fail, and therefore cause assets to exit the market.[29] After review, the Agencies either clear the transaction or challenge the transaction, usually by filing for a preliminary injunction in federal court.[30]

If the matter goes to litigation, the pursuing agency has the initial burden of production.[31] Satisfying this burden is typically based on structural statistics that focus on establishing the scope of the relevant market, market shares of the firms involved in the transaction, the market concentration resulting from the transaction, and how the market power and concentration resulting from the transaction would "substantially lessen competition."[32] Once the pursuing agency has met its burden and established a prima facie case, the merging firms must rebut the structural statistics and inferences.[33] Under current jurisprudence, the courts must look beyond the statistics and examine the "structure, history, and probable future" of the market,[34] which entails balancing anticompetitive effects on one side and the ease of entry, efficiencies, and failing or exiting assets on the other.

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to make enforcement decisions, the Merger Guidelines do not have the force of law. SCHLOSSBERG, *supra* note 1, at 16-22.

[25] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines §§ 1.0-1.5 [hereinafter Merger Guidelines], (1997), *available at* http://www.usdoj.gov/atr/public/guidelines/horz_boo/hmg.1.html.

[26] *Id.* at §§ 2.0-2.2.

[27] *Id.* at §§ 3.0-3.4.

[28] *Id.* at § 4.

[29] *Id.* at §§ 5.0-5.2.

[30] 15 U.S.C. § 18a(f).

[31] SCHLOSSBERG, *supra* note 1, at 141.

[32] *Id.*

[33] *Id.*

[34] United States v. Gen. Dynamics Corp., 415 U.S. 486, 498 (1974) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 322 n. 38 (1962)).

III. THE FAILING COMPANY DOCTRINE

The failing firm doctrine was first introduced to antitrust law by the United States Supreme Court in *International Shoe Company v. Federal Trade Commission.*[35] In May 1921, the Federal Trade Commission filed a complaint against the International Shoe Company, the largest shoe company in the United States, for acquiring the W.H. McElwain Company, the largest shoe company in New England, through purchase of the latter's capital stock.[36] The Federal Trade Commission found, as did the First Circuit Court of Appeals, that the two companies were in substantial competition and that the acquisition "substantially lessened competition" in the shoe business, and therefore, violated section 7 of the Clayton Act.[37] The Supreme Court reversed.[38]

Justice Sutherland, writing for the majority, held that reversal of the First Circuit's decision was justified on two grounds. First, the companies were not in substantial competition because the products of the two companies – i.e., men's dress shoes – were of different appearance and workmanship, and although sold in the same states, "appealed to the tastes of entirely different classes of consumers."[39] Second, in a frequently cited quote, Justice Sutherland found:

> In the light of the case thus disclosed of a corporation [McElwain] with resources so depleted and the prospect of rehabilitation so remote that it faced the *grave probability of a business failure* with resulting loss to its stockholders and injury to the communities where its plants were operated, we hold that the purchase of its capital stock by a competitor (there being *no other prospective purchaser*), not with a purpose to lessen competition, but to

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[35] 280 U.S. 291 (1930).

[36] *Id.* at 294.

[37] *Id.* At the time of *International Shoe*, § 7 of the Clayton Act provided:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

Clayton Act § 7, c. 323, 38 Stat. 730, 731.

[38] *Id.* at 303.

[39] *Id.* at 296-97.

> facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable, is not in contemplation of law prejudicial to the public and *does not substantially lessen competition* or restrain commerce within the intent of the Clayton Act. To regard such a transaction as a violation of law, as this Court suggested in *United States v. U.S. Steel Corp.*, 251 U.S. 417, 446-447, would "seem a distempered view of purchase and result.[40]

Thus was born the failing firm doctrine. However, the Court withheld any statement that a defense was established. Rather, its characterization was more akin to a "factor" that would hereafter be considered when analyzing the anticompetitive effects of a merger and determining whether competition was substantially lessened.[41] Thus, *International Shoe* left many unanswered questions regarding how a firm's failing condition would be considered in merger regulation.[42]

In 1950, Congress made two amendments to § 7 of the Clayton Act through passage of the Celler-Kefauver Act. First, § 7 was amended to apply to asset sales in addition to stock transactions.[43] Second, the statutory test for violations was redefined to prohibit a merger where "in any line of commerce . . . in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly."[44]

As the amendments moved through both houses, *International Shoe* was mentioned on several occasions. The most significant remarks came in the reports of the House and Senate Judiciary Committees, both of which endorsed the *International Shoe* opinion and understood it to create a failing firm exception to the Clayton Act.[45] Unlike the Court in *International Shoe*,

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[40] *Id.* at 302-03 (emphasis added).

[41] Edward O. Correia, *Symposium: Perspective on Efficiencies and Failing Firms in Merger Analysis: Re-Examining the Failing Company Defense*, 64 ANTITRUST L. J. 683 (1996).

[42] Martin F. Connor III, *Section 7 of the Clayton Act: The "Failing Company" Myth*, 49 GEO. L. J. 84, 84-85 (1960).

[43] Celler-Kefauver Act of 1950, ch. 1184, §§ 7, 11, 64 *Stat.* 1125, 1125-28 (codified as amended at 15 U.S.C. §§ 18, 21 (2000)).

[44] *Id.*

[45] *See* S. Rep. No. 1775, 81st Cong., 2d Sess. 7 (1950), reprinted in 1950 U.S.C.C.A.N. 4293, 4299: The argument has been made that the proposed bill, if passed, would have the effect of preventing a company which is in a failing or bankrupt condition from selling out. The committees are in full accord with the proposition that any firm in such a condition should be free to dispose of its stock or assets. The committees, however, do not believe that the proposed bill will prevent

the Committees described the significance of imminent failure as a defense, rather than a factor.[46] Accordingly, the courts were not to balance the likelihood of failure against the likely anticompetitive effects. Rather, if conditions indicating imminent failure existed, there was to be absolute immunity from liability under the Act.[47] However, the Committee's perspective was never incorporated into the language of either amendment. Thus, defining the nature of the failing firm doctrine remained in the hands of the courts.

In 1962, the Supreme Court decided *Brown Shoe Company, Inc. v. United States*, its first opinion addressing the Clayton Act subsequent to the 1950 amendments.[48] In *Brown Shoe*, the Court provided "the official interpretation" of Congress' intention in amending the Clayton Act, and in the process, acknowledged the continued viability of the failing firm doctrine.[49] The Court stated:

> [A]t the same time that it sought to create an effective tool for preventing all mergers having demonstrable anticompetitive effects, Congress recognized the stimulation to competition that might flow from particular mergers. When concern as to the Act's breadth was expressed, supporters of the amendments indicated that it would not impede, for example, . . . *a merger between a corporation which is financially healthy and a failing one which no longer can be a vital competitive factor in the market.* . . . Taken as a whole, the legislative history illuminates congressional concern with the protection of *competition*, not *competitors*, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition.[50]

Although *Brown Shoe* affirmed the viability of the failing firm

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sales of this type. The judicial interpretation on this point goes back many years and is abundantly clear. According to decisions of the Supreme Court, the Clayton Act does not apply to bankruptcy or receivership cases. Moreover, the Court has held, with respect to [§ 7], that a company does not actually have to be in a state of bankruptcy to be exempt from its provisions; it is sufficient that it is heading in that direction with the probability that bankruptcy will ensure.

[46] Correia, *supra* note 41.

[47] *Id.*

[48] Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[49] Oliver Zhong, Note, *The Failing Company Defense After the Commentary: Let It Go*, 41 U. MICH. J.L. REFORM 745, 758 (2008).

[50] *Brown Shoe*, 370 U.S. at 319-20 (emphasis added).

doctrine, the question as to its proper application as either a defense or a factor remained unanswered. Over the following years, the failing firm doctrine was frequently litigated in lowers court but upheld only twice, and without development.[51] So in 1969 when certiorari was granted for *Citizen Publishing Company v. United States*, the Supreme Court was given the opportunity to expound upon its theory of the doctrine.

In *Citizen Publishing*, the only two daily newspapers of Tucson, Arizona—the Star and the Citizen—which had been vigorous competitors, entered into a joint operating agreement.[52] The purpose of the agreement was "to end any business or commercial competition" between the two newspapers, and to that end three controls were imposed, including price fixing, profit pooling, and market control.[53] The newspapers' "only real defense" to the alleged Clayton Act violation was that the Citizen was a failing firm, and cited heavy financial losses and an inability to gain advertising revenue.[54]

Justice Douglas, writing for the majority, built upon *International Shoe* and announced a three-prong test for application of "the 'failing firm' defense."[55] First, the acquired firm must be in a failing condition; in other words, a "grave probability of business failure" must exist.[56] Second, the failing firm must have no realistic prospect for successful reorganization.[57] Third, the failing firm must demonstrate that no other viable alternative purchaser exists.[58] The burden of proving each condition rests on the

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[51] Granader v. Pub. Bank, 281 F. Supp. 120 (E.D. Mich. 1967), *aff'd*, 417 F.2d 75 (6th Cir. 1969), *cert. denied*, 397 U.S. 1065 (1970); United States v. Md. & Va. Milk Producers Ass'n, 167 F. Supp. 799 (D.D.C. 1958).

[52] Citizen Publishing Co. v. United States, 394 U.S. 131, 133 (1969).

[53] *Id.* at 134. The market control imposed was that neither the Star nor the Citizen nor any of their stockholders, officers, or executives were allowed to engage in any other business in the metropolitan area of Tucson in conflict with the agreement.

[54] *Id.* at 136. "While their circulation was about equal, the Star sold 50% more advertising space than the Citizen and operated at a profit, while the Citizen sustained losses. Indeed, the Stars annual profits averaged about $25,825 while the Citizen's annual losses averaged about $23,550." *Id.* at 133.

[55] *Id.* at 136.

[56] *Id.* at 137.

[57] *Id.* at 138.

[58] *Id.* at 137. To satisfy the third prong, the failing firm must demonstrate that it has made a reasonable, good faith attempt to locate an alternative buyer that would both keep it in the market and pose a less severe danger to competition. Michigan Citizens for an Indep. Press v. Thornburgh, 868 F.2d 1285, 1288 (D.C. Cir. 1989).

proponents of the merger.[59]

Since the doctrine's ascendency to an affirmative defense, invocation of the failing firm defense at trial has proven difficult. As evidenced by some of the more extreme cases addressing the issue, the difficulty lies in proving that a firm is in fact "failing." For example, one district court held that an acquired firm, which was "a marginal operation . . . casting about to find a purchaser," did not qualify as a failing firm even though the firm "had a life expectancy of only about two years."[60] In another case, an acquired firm that experienced losses in thirty-three of the forty-five years prior to acquisition was held not to be "failing" because the firm's parent company was found to have enjoyed profits.[61] Finally, one district court held that an acquired firm could not establish a failing condition even though (1) the firm was in a "precarious" financial condition in light of "sharply" declining sales; (2) the firm had lost more than $1.6 million of net income in six months; and (3) the firm's "over-all competitive condition . . . was bleak."[62] The district court based its holding on the firm's inability to establish that the downward trend was irreversible.[63]

In 1992, the Agencies expressly recognized the failing firm defense by incorporating it into the Merger Guidelines.[64] While the precise conditions are slightly different than in *Citizen Publishing*, the Guidelines in general find that:

> [A] merger is not likely to create or enhance market power or to facilitate its exercise, if imminent failure . . . of one of the merging firms would cause the assets of that firm to exit the relevant market. In such circumstances, post-merger performance in the relevant market may be no worse than market performance had the merger been blocked and the assets left the market.[65]

Pursuant to the Merger Guidelines, the four conditions of the failing firm

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[59] *Citizens Publishing*, 394 U.S. at 138-39.

[60] United States v. Continental Oil Co., 1967 Trade Case, P72,292 (D. N.M. 1967) (citing United States v. Continental Oil Co., 1965 Trade Cas. P71,557 (D. N.M. 1965)).

[61] In the matter of Farm Journal, Inc., 53 F.T.C. 26, 12 (1956).

[62] United States v. Pabst Brewing Co., 296 F. Supp. 994, 1000-01 (E.D. Wis. 1969).

[63] *Id.* at 1000.

[64] Schlossberg, *supra* note 1, at 209.

[65] Merger Guidelines, *supra* note 25, § 5.0.

defense are as follows: (1) the allegedly failing firm would be unable to meet its financial obligations in the near future; (2) the firm would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act; (3) the firm has made unsuccessful good-faith efforts to elicit reasonable alternative offers to acquire its assets[66] that would keep both its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger; and (4) absent the acquisition, the assets of the firm would exit the relevant market.[67] If one of the merging firms meets each of these conditions, the failing firm defense is established and the Agencies will not challenge the proposed transaction. However, satisfying these conditions is also highly demanding, as the Agencies have narrowly construed the defense.[68]

First, the Merger Guidelines provide no set list of conditions that, if present, demonstrate that a firm would be unable to meet its financial obligations in the near future. The Agencies, rather, must conduct a case-by-case analysis when merging firms assert the failing firm defense. Two major factors considered are whether the firm's total liabilities exceed its total assets over a period of time[69] and whether a firm's costs are greater than its revenues.[70] The Agencies will also look at the ability of the firm to obtain new resources or customers and whether the cited losses are short term and likely to reoccur.[71] Further, the Agencies will examine whether a firm's financial problems are part of an irreversible downward trend or whether they are more attributable to the general, and temporary, depressed state of the economy.[72]

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[66] Any offer to purchase the assets of the failing firm for a price above the liquidation value of those assets—the highest value used outside the relevant market or an equivalent offer to purchase the stock of the failing firm—will be regarded as a reasonable alternative offer. *Id.* at § 5.1.

[67] *Id.*

[68] Zhong, *supra* note 49, at 763.

[69] *See* California v. Sutter Health Sys., 130 F. Supp.2d 1109, 1134-35 (N.D. Cal. 2001).

[70] *See* Remarks of Kevin J. Arquit, Director, Bureau of Competition, Fed. Trade Comm'n, Before the American Bar Association, *The Failing Firm Defense and Related Issues* 9 (Apr. 12, 1991). A decline in sales or a negative current profit, standing alone, is insufficient to demonstrate that the firm would be unable to meet its financial obligations.

[71] *See* Ken Heyer & Sheldon Kimmel, *Merger Review of Firms in Financial Distress*, COMPETITION POLICY INTERNATIONAL 4, 6 (Mar. 2009).

[72] *Id.*

Second, the Agencies consider whether elimination of the firm's debt through a bankruptcy proceeding could correct its failing financial condition.[73] In making this determination, the Agencies may contact the firm's creditors to determine whether they can, and are willing to, work out a plan to restructure the firm's debts.[74] For example, a creditor may be willing to restructure existing loans or provide additional loans to maintain a firm if its business prospects are promising.[75] Thus, when determining the ability of a firm to reorganize through bankruptcy, the Agencies will investigate whether a firm has had discussions with its creditors and what the creditors plan to do in the absence of the merger.[76]

Next, to demonstrate that no alternative less detrimental to competition exists, the Guidelines require a firm to have made a good faith effort to seek reasonable alternative offers from other potential purchasers.[77] Any offer to purchase the assets of the failing firm for a price above the liquidation value of its assets will be regarded as a reasonable alternative offer.[78] Moreover, if the assets would likely be purchased by a firm that presents no, or fewer, competitive problems, then the firm's failing financial condition does not establish that the proposed merger is harmless.[79]

Determining whether a firm sufficiently pursued alternative purchasers can be difficult because such determination is dependent upon the nature and size of the relevant market. The Agencies require the following: (1) that a number and variety of firms be contacted, (2) that sufficient information be provided to firms expressing interest, and (3) that legitimate expressions of interest be pursued seriously.[80] General expressions of interest from alternative purchasers, without the extension of an actual offer, do not constitute reasonable alternative offers.[81] Nevertheless, the burden is on the

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[73] *See* Remarks of Delegation of the United States to the Competition Committee, Before the Organization for Economic Co-operation and Development, Failing Firm Defense, Oct. 6, 2009, § 10.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Sutter Health*, 130 F. Supp. 2d at 1136 (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)).

[78] Merger Guidelines, *supra* note 25, § 5.1 n.39.

[79] Heyer & Kimmel, *supra* note 71, at 5.

[80] Arquit, *supra* note 70, at 16.

[81] *Sutter Health*, 130 F. Supp. 2d at 1137; United States v. Culbro Corp., 504 F. Supp. 661, 669 (S.D.N.Y. 1981).

merging firms to demonstrate that alternative purchasers are unreasonable and not less detrimental to competition than the merger itself.

Finally, the Merger Guidelines require that, absent the acquisition, the assets of the firm would exit the market. The mere fact that no alternative purchaser can be found does not imply that the allegedly failing firm would liquidate its assets rather than continue to operate in the market.[82] This condition can be difficult to determine because supporting evidence rests largely in the hands of the firm.[83] Thus, the Agencies require the firm to provide objective evidence showing that it is not more profitable to continue to operate in the market than to liquidate.[84]

IV. CONCLUSION

In my research, I did not find a case occurring during the course of the economic crisis in which the failing firm defense was raised against an alleged § 7 violation. My theory for this absence of case law is that the cases in which the defense could have been raised were not challenged by the Agencies and therefore did not reach a federal district court. Nevertheless, I conclude that the failing firm defense should not be modified during an economic crisis situation.

The purpose of the defense is to permit mergers involving a failing firm so long as competition is promoted. When merging firms assert the failing firm defense, the reviewing entity considers (1) the relevant market; (2) ease of entry; (3) efficiencies; and (4) failing or exiting assets. If the review is properly executed, the economy is merely the backdrop against which competition is analyzed. Accordingly, a merger that satisfies the failing firm defense during a recession should satisfy the defense during a thriving economy for the very same reasons. Therefore, although the failing firm defense may be asserted more frequently during an economic crisis situation, the state of the economy should not change the defense.

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[82] Delegation Remarks, *supra* note 73, § 15.

[83] Arquit, *supra* note 70, at 29.

[84] Delegation Remarks, *supra* 73, § 15.

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